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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

It is not known for what offense the Respondent, **DICKIE COKELEY ("COKELEY")**, was convicted. He was charged by information of the offense of rape by engaging in sexual intercourse by forcible compulsion. Without the benefit of an amendment to that information, the jury was instructed on an additional offense, the crime of rape by deviate sexual activity. Since the jury convicted him by returning a general verdict, it is impossible to know whether Cokeley was convicted of an offense that he was charged or one which he was not charged.

At the time of Cokeley's conviction, there were two (2) separate and distinct crimes of rape: rape by forcible sexual intercouse; and rape by deviate sexual activity. In affirming his conviction, the Arkansas Supreme Court specifically overruled existing Arkansas law, and ruled that there was only one crime of rape with two methods of commission. The Arkansas Supreme Court then retroactively applied this new ruling to Cokeley even though this was not the law at the time he was charged and convicted.

After his Petition for Rehearing Before the Arkansas Supreme Court and Petitions for Writ of Certiorari to this Court were denied, Cokeley filed a Petition for Writ of Habeas

Corpus with the United States District Court for the Eastern District of Arkansas. Cokeley's principal point for grant of Writ of Habeas Corpus was that he was denied due process because he was convicted of a crime for which he was not charged. The District Court denied the writ. On appeal the Eighth Circuit Court of Appeals reversed, finding that Cokeley's due process rights were violated because he was convicted of a crime for which he was not charged.

REASONS FOR NOT GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION FINDING THAT COKELEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED OF A CRIME FOR WHICH HE WAS NOT CHARGED IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

It has long been the law that one cannot be convicted of a crime with which he was not charged. The Eighth Circuit did not ignore precedent or break new ground. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978); and *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Eighth Circuit merely upheld this historic Anglo-American principle in finding that Cokeley's due process rights were violated when he was convicted of a crime with which he was not charged. Affirmance of such a well-established principle does not give rise to certiorari.

In an attempt to gain review, the Petitioner makes several misstatements. Contrary to the Petitioner's assertions, Cokeley did seek a rehearing before the Arkansas Supreme Court. It was denied April 21, 1986. See *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986). The Petitioner is wrong in its assertion that Cokeley did not raise this issue. He has always maintained that his due process rights were violated because he was convicted of a crime with which he was not charged. See Petitioner's Appendix, p. C-2. The District

Court found no waiver and found that Cokeley exhausted his available state remedies.

Cokeley was charged with one crime, rape by sexual intercourse. Without the benefit of an amendment to the information, the jury was instructed on two separate crimes: rape by deviate sexual activity; and rape by sexual intercourse. He was convicted by a general verdict and sentenced to 40 years. It is impossible to determine if he was convicted of a crime for which he was not charged or a crime with which he was charged. This is a clear violation of due process.

At the time of Cokeley's trial and conviction, rape by deviate sexual activity and rape by sexual intercourse were two distinct and separate crimes. *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983). Cokeley was charged with one crime, rape by sexual intercourse. The jury was instructed on two crimes, rape by sexual intercourse and rape by deviate sexual activity. To affirm Cokeley's conviction, the Arkansas Supreme Court had to state "we were wrong and overrule *Clayborn*" and apply this new definition of rape to Cokeley. See *Cokeley v. State*, 288 Ark. @ 351, 705 S.W.2d @ 426. After the *Cokeley* decision, there was one crime of rape with two ways of commission. The problem is that Cokeley was convicted

of a crime which he was not charged. Under the law as it existed at the time of his conviction, there were two separate crimes of rape: rape by sexual intercourse and rape by deviate sexual activity. Cokeley was convicted of a separate and distinct crime from that which he was charged, which is a clear denial of Cokeley's due process rights.

The Petitioner argues that the change in the Arkansas rape statute was foreseeable. It relies upon two cases: *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985); and *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981). The *Wood* case cannot have any bearing on the issue of foreseeability since it was decided after Cokeley was convicted. Cokeley was convicted on April 17, 1985, and *Wood* was decided on October 21, 1985. Even if the *Wood* case was applicable to analysis of this issue, it is clearly distinguishable. In *Wood*, the State was allowed to amend its information and charge the defendant with two crimes: rape by sexual intercourse; and rape by deviate sexual activity. At the time of the *Wood* decision, the State still recognized two distinct and separate crimes. The issues addressed in *Clayborn* were not raised in *Wood*. The *Wood* case did not even mention or attempt to distinguish *Clayborn*. *Browning v. State* dealt with evidentiary issues.

That case did not go to the jury on a crime not charged. Cokeley's case did.

There is nothing in the record to support the Petitioner's assertion that Cokeley was aware that the alleged victim would testify that she had been raped by means of sexual intercourse and rape by means of deviate sexual activity in advance of trial. The record indicates otherwise. The only notice Cokeley had was the information which charged him with one crime, rape by sexual intercourse. The requirement of notice "is implemented primarily by the charging paper which contains the elements of the offense so as to fairly inform a defendant of the charge which he must defend." *Goodloe v. Parratt*, 605 F.2d 1041, 1045 (8th Cir., 1979) [citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887 (1974)]. At trial, Cokeley was not prepared to defend against the crimes. He was on notice only of the crime charged in the indictment.

The Petitioner cites no decision of the United States Supreme Court which requires this Court to follow a State Court decision which violated a person's due process rights by convicting him of a crime for which he was not charged. The Petitioner argues that this Court is bound by the State Court's decision and *Cokeley v. State, supra*, redefining the

Arkansas rape statute and applying this new definition to Cokeley. The Eighth Circuit was not bound by such a decision. Federal courts are not bound to give constitutional effect to state court construction when the effect of such construction results in deprivation of constitutional rights. See *Missouri v. Hunter*, 464 U.S. 78 (1983). The fact is that Cokeley was convicted of a crime for which he was not charged. His due process rights were violated. The cases relied on by the Petitioner are not applicable to the case. The Petitioner's cases deal with application of procedural issues, application of which do not affect constitutional rights. A federal court will be bound by Arkansas' construction of the rape statute as set forth in the *Cokeley* case in the future. It is the application of that decision to the Respondent which is constitutionally prohibited because it results in Respondent being convicted of a crime with which he was not charged.

CONCLUSION

The Eighth Circuit's decision in *Cokeley* does not represent a departure from well-established constitutional principles. This Court simply affirmed an ancient Anglo-American legal principal, that one cannot be convicted of a crime with which he was not charged. Cokeley was convicted of a crime that he was not charged with, and the Eighth Circuit properly granted *habeas* relief. The decision was consistent with decisions of this Court. The situation which gave rise to *habeas* review is isolated and given the affirmance of a long-established constitutional principle, not worthy of review by this Court. The State's petition should be denied.

Respectfully submitted:

DICKIE COKELEY, RESPONDENT

BY: _____

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CERTIFICATE OF SERVICE

I, **DANIEL R. CARTER**, attorney for Respondent, Dickie Cokeley, do hereby certify that I have forwarded two (2) copies of the foregoing Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, by U. S. Mail, first class postage prepaid, to: Olan Warren Reeves, Sr. Assistant Attorney General, Suite 200, 323 Center Street, Little Rock, AR 72201, (501) 682-8078, on this 17th day of June, 1992. All parties required to be served have been served.

DANIEL R. CARTER